IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

CASE NO. 21-12355

NETCHOICE LLC, et al.,
Plaintiffs-Appellees,

v.

ATTORNEY GENERAL, STATE OF FLORIDA, et al.,
Defendants-Appellants.

On Appeal from the United States District Court
for the Northern District of Florida, No. 4:21-cv-220
(Hon. Robert Lewis Hinkle)

BRIEF OF THE CATO INSTITUTE AS *AMICUS CURIAE* IN SUPPORT OF PLAINTIFFS-APPELLEES

Ilya Shapiro
Counsel of Record
Thomas A. Berry
CATO INSTITUTE
1000 Mass. Ave., N.W.
Washington, DC 20001
(202) 842-0200
ishapiro@cato.org

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CERTIFICATE OF INTERESTED PERSONS

In addition to the persons and entities previously identified by the parties, undersigned counsel certifies that the following persons and entities have an interest in the outcome of this case:

A. Cato Institute;

B. Ilya Shapiro and Thomas A. Berry, counsel for *amicus curiae*.

SO CERTIFIED, this 15th day of November, 2021.

/s/ Ilya Shapiro
Counsel for *Amicus Curiae*

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INTEREST OF *AMICUS CURIAE*[1]

The Cato Institute is a nonpartisan public policy research foundation founded in 1977 and dedicated to advancing the principles of individual liberty, free markets, and limited government. Cato's Robert A. Levy Center for Constitutional Studies was established to restore the principles of limited constitutional government that are the foundation of liberty. Toward those ends, Cato publishes books and studies, conducts conferences and forums, and produces the annual *Cato Supreme Court Review*. This case interests Cato because it concerns the application of basic First Amendment principles to social media, a critically important issue in the digital age.

SUMMARY OF THE ARGUMENT

Florida's social media regulations purport to stop the "censorship of big tech." Yet the method that the state has chosen for remedying this problem is to impose its own form of internet censorship. Florida's law forces disfavored platforms to censor content they otherwise would include and to host material to which they object. The law grants special privileges to a favored class of users, discriminates among online voices, and allows some users (but not all) to override a platform's editorial freedom. The law takes away a platform's freedom to make case-by-case editorial judgments and gives judges the power to mandate that content be removed or retained based on

[1] Fed. R. App. P. 29 Statement: No counsel for either party authored this brief in whole or in part. No person or entity other than *amicus* made a monetary contribution to its preparation or submission. All parties have been timely notified and consented to the filing of this brief.

their own views of what is "consistent." Further, the law establishes barriers to competition in the market for social media platforms.

Platforms have a right to select and organize the content they host. They likewise have a right to decline to host content. This editorial right is not contingent on a platform's prior exercise of the right, nor on whether a platform aims to present a "unified" message. Although social media may be a relatively new medium, long-established First Amendment principles should be the guide to resolving this case. When platforms themselves speak, that speech is protected. When platforms publish content to the public, they are protected in doing so just as the publisher of a newspaper editorial or a book is protected. And when platforms exercise their discretion in selecting and sorting the content they present to users, the First Amendment protects those editorial choices.

Although Florida claims that it seeks to undermine "big tech tyranny," its new regulations actually *benefit* the largest and most established social media companies at the expense of present and future competition. By imposing steep liability for non-compliance, these regulations would incentivize potential competitors to sell themselves to larger entities like Facebook once they approach the law's threshold for regulation. Consequently, incumbents would enjoy competitive moats in contrast to the relatively frictionless conditions that allowed them to grow.

Further, the success of alternative platforms depends on their ability to compete and on the freedom of those building new platforms to develop new products. "Neutrality" requirements prevent the emergence of platforms with distinct, differentiable offerings.

Whatever disagreement one may have with the editorial choices a particular platform has made, shifting control over those choices to the state is not the answer.

ARGUMENT

I. PLATFORMS ENGAGE IN PROTECTED EDITORIAL ACTIVITY WHEN THEY PUBLISH, REMOVE, AND CURATE CONTENT

The First Amendment protects a platform's freedom to select the speech it wishes to host, a freedom that includes "deciding whether to publish, withdraw, postpone or alter content." *Zeran v. Am. Online, Inc.*, 129 F.3d 327, 330 (4th Cir. 1997). Social media platforms do exactly that. Whether they select and edit with a light or heavy hand, all social media platforms must make choices about which third-party content to permit and which to exclude on their platforms. These platforms screen and monitor content based on platform-specific rules and guidelines, withdraw previously published content, arrange content, and sometimes add their own message to that content. To give users a less cacophonous experience amidst a torrent of content, platforms actively rank, emphasize, and de-emphasize the speech they host. Thus, a core aspect of social media platforms' operation is engaging in the editorial privilege that the First Amendment protects from government interference.

The Supreme Court has long recognized that the First Amendment freedom of speech encompasses the freedom to select, edit, and present speech. Writing in the context of a newspaper editorial page, the Court explained that "[t]he choice of material . . . the decisions made as to limitations on the size and content . . . and treatment of public issues and public officials—whether fair or unfair—constitute the exercise of editorial control and judgment." *Miami Herald Pub. Co., Div. of Knight Newspapers, Inc. v. Tornillo*, 418 U.S. 241, 258 (1974).

But this editorial freedom extends far beyond newspapers and other print media. *See, e.g.*, *Hurley v. Irish-Am. Gay, Lesbian & Bisexual Grp.*, 515 U.S. 557 (1995) (finding that editorial privilege extends to parade organizers). It extends to any platform that hosts and presents speech, including online platforms. *See, e.g.*, *Brown v. Entm't Merchs. Ass'n*, 564 U.S. 786, 790 (2011) (noting that First Amendment protections "do not vary when a new and different medium for communication appears"). *See also La'Tiejira v. Facebook, Inc.*, 272 F. Supp. 3d 981 (S.D. Tex. 2017) (finding that the First Amendment extends to social media networks); *Zhang v. Baidu.com, Inc.,* 10 F. Supp. 3d 433, 437 (S.D.N.Y. 2013) (same regarding internet search engines); *Langdon v. Google, Inc.*, 474 F. Supp. 2d 622, 629–30 (D. Del. 2007) (same). In sum, the First Amendment protects the selection of speech on a public expressive platform, and that right is to be construed broadly.

But Florida's social media law, S.B. 7072, significantly infringes this editorial right for disfavored platforms. It imposes a 30-day ban on hosting certain speech through its "consistency provision." It also forces platforms to forgo many of their standard moderation practices with respect to certain privileged users and imposes draconian penalties for noncompliance. To justify its abridgement of editorial rights, Florida argues that social media platforms are not entitled to First Amendment protections because they do not create a "unified speech product" and because they currently open themselves up for use by the general public with relatively light moderation policies. But the First Amendment's protections are not contingent on either of these criteria.

A. A Platform's First Amendment Rights Do Not Depend on Whether the Platform Exercised Those Rights in the Past

Florida argues that social media platforms have held themselves out to the public as viewpoint-neutral forums, and that for that reason it is constitutional to *force* them to remain viewpoint-neutral forums indefinitely. Def.-App. Br. at 36. In other words, Florida claims that social media platforms have forfeited their First Amendment right to engage in ideologically based content moderation by not having previously engaged in enough ideologically based moderation.

First Amendment rights cannot be so easily forfeited. Even if it were true that all social media platforms currently "h[e]ld themselves out to serve the public indiscriminately," that would not obliterate their editorial privilege. Def.-App. Br at

10 (quoting *U.S. Telecom Ass'n v. FCC*, 825 F.3d 674, 740 (D.C. Cir. 2016)). And indeed, Florida's factual premise is false. Social media platforms routinely make user access contingent on ongoing compliance with community standards, and this Court has upheld their discretion to decide how to enforce those standards. *Illoominate Media, Inc. v. CAIR Fla., Inc.*, 841 Fed. Appx. 132 (11th Cir. 2020) (upholding the dismissal of a lawsuit by a political personality over her Twitter ban.) When Twitter removes content that it views as election misinformation, vaccine misinformation, violence, and even nudity, it engages in content-based and viewpoint-based moderation. Were it the government, those actions would be unconstitutional—but thankfully, Jack Dorsey holds no public office.

Florida's argument is, in essence, that social media platforms have not been ideological *enough* in their editorial choices, so it is permissible to impose on them common-carrier style speech-hosting obligations. But Florida's "use it or lose it" theory of speech protections is incompatible with the First Amendment regardless of the aptness of common-carrier analogies. Then-Judge Kavanaugh identified this logical problem in his dissent in *U.S. Telecom Ass'n v. FCC*, which concerned the editorial rights of internet service providers:

> The FCC's "use it or lose it" theory of First Amendment rights finds no support in the Constitution or precedent. . . It may be true that some, many, or even most Internet service providers have chosen not to exercise much editorial discretion, and instead have decided to allow most or all Internet content to be transmitted on an equal basis. But that "carry all comers" decision itself is an exercise of editorial discretion.

> Moreover, the fact that the Internet service providers have not been aggressively exercising their editorial discretion does not mean that they have no right to exercise their editorial discretion.

855 F.3d 381, 429 (D.C. Cir. 2017). A social media platform's choice to include all speech or most speech is likewise an exercise of that right. The First Amendment's editorial privilege applies when an actor engages in editorial activity; it doesn't depend on that actor's historical exercise of that activity.

B. A Platform's First Amendment Rights Do Not Depend on Whether the Platform Offers a "Unified Speech Product"

Florida argues that because "social media companies cannot be said to produce a unified speech product"—a viewpoint or message users can identify as originating from the platform itself—they receive limited First Amendment protection. Def.-App. Br. at 30. But the Constitution imposes no such prerequisite.

Also referred to as a "common theme" or a "coherent" speech product, this point has received recent attention from scholars exploring whether platforms may be regulated as common carriers consistent with the First Amendment. *See, e.g.*, Ashutosh Bhagwat, *Do Platforms Have Editorial Rights?* 1 J. Free Speech L. 143 (2021); Eugene Volokh, *Treating Social Media Platforms Like Common Carriers?*, 1 J. Free Speech L. 377 (2021). Proponents of the coherence-as-prerequisite theory argue that the Supreme Court has upheld infringements on the First Amendment rights of editors when their "message" lacked unification or coherency. They argue that the lack of a message made these infringements on editorial rights less grave.

But the Supreme Court's own explanation of the rights of editors is incompatible with that view. "A private speaker does not forfeit constitutional protection simply by combining multifarious voices, or by failing to edit their themes to isolate an exact message." *Hurley*, 515 U.S. at 569–70. The fact that an online platform chooses to host a wide range of views and topics is no basis for curtailing its First Amendment rights. That choice itself embodies a protected editorial judgment. If an editor chooses to host a wide range of voices and viewpoints, that editor does not forfeit the right to nonetheless exclude certain speech as off-limits, nor to prioritize some messages over others. Indeed, a contrary constitutional rule would encourage online services to allow *less* speech, not more, in an attempt to establish that they do in fact present a coherent speech product. The First Amendment does not require that paradoxical result.

II. THE FLORIDA LAW'S REGULATION OF PLATFORMS' TERMS OF SERVICE VIOLATES THE FIRST AMENDMENT

Platforms have both protected speech rights when they speak and protected editorial rights when they edit. Florida's law infringes both of these independent rights in several ways, including an outright ban on platforms' own speech ("the addenda ban") and two content- and identity-based must-carry provisions, which force platforms to host even the most offensive content if it comes from the government's list of favored users. Fla. Stat. § 106.072 (1)(a); § 501.2041(2)(j).

No less constitutionally infirm are the law's restrictions on platforms' terms of service. *Id.* § 501.2041(2)(b), (c). Florida's brief argues that these "consistency provisions" and their "neutral" limit on changing a platform's terms of service more than once every 30 days are the least constitutionally suspect parts of the law. App.-Def. Br. at 39 ("[I]f the Court rejects everything that has been said so far about the Act's hosting regulations, it should still uphold the [consistency provisions]."). But for several reasons, these parts of the law cannot stand.

First, the law's "consistency provision" actually functions as a ban on speech, the type of First Amendment infringement the Constitution proscribes most strictly. Bhagwat, *supra*. Under Section (2)(b), platforms are forced to remove (or keep up) all content that is the same or similar to content they have previously taken down (or kept up).[2] This provision works in conjunction with section (2)(c), which prohibits platforms from changing "user rules, terms, and agreements" more than once every 30 days. App.-Def. Br. at 39. Taken together, the law creates 30-day cycles of censorship. Even if a platform wants to leave certain content up, it may not do so if within the past 30 days it has removed other content that a court might find to be similar to the content it wishes to leave up. This means that under the threat of

[2] How platforms are supposed to determine whether certain speech is the same or similar to other speech goes unexplained.

draconian civil penalty, platforms could be forced to remove speech that they wish to publish—a core First Amendment injury.

Second, Section (2)(c)'s 30-day prohibition on changing a platform's terms of service strikes at the core of platforms' right to decide "whether to publish, withdraw, postpone or alter content" by sharply limiting the exercise of these fundamental editorial judgments. *Zeran*, 129 F.3d at 330. By cyclically seizing control of platforms' discretion over what to take down, what to leave up, and when the terms of service can be changed, the law does not merely "leave the substance of [content moderation] policies . . . entirely up to the platforms themselves" but instead functions to periodically remove their First Amendment right to select the content they host and display. Def.-App. Br. at 39.

Put simply, editors have a First Amendment right to make case-by-case determinations as to what speech they wish to display and what speech they wish to exclude. Florida's law would, in the name of "consistency," take that choice away from editors and place it in the hands of the state and its judges.

III. THOSE DISSATISFIED WITH DOMINANT PLATFORMS SHOULD SEEK WAYS TO FACILITATE COMPETITION AND INNOVATION

Ironically, in attempting to undermine the influence of large social media platforms, Florida's law would likely cement their dominance. First, onerous regulations encourage would-be competitors to sell to incumbents. Florida's law would create this dynamic by dramatically raising the cost of compliance, creating

a Florida-specific regulatory scheme and imposing severe penalties for violations of its must-carry and "consistency" provisions. Second, "neutrality" requirements limit the creative space for differentiated products. The success of alternatives to large platforms depends on competition and the freedom of those building new platforms to develop new products. Large social media companies are by no means invulnerable, but constraining their editorial discretion will cement the incumbency advantages they enjoy and delay the emergence of serious competition. Big Tech's giants can afford a phalanx of lawyers and compliance officers; their would-be upstart competitors may not be able to.

By complicating the regulatory environment and imposing high costs, Florida would accomplish the opposite of its stated goals by tilting the social media marketplace even more in favor of incumbents. Applying to platforms with annual gross revenues in excess of $100 million or at least 100 million monthly platform users globally, the law's scope currently includes only Facebook, Twitter, YouTube, TikTok, and Wikipedia (with conspicuous carveouts for theme-park owning Disney and Comcast). By establishing such an arbitrary threshold, the law will give start-ups the incentive to sell themselves to one of these companies before they themselves approach this threshold.

Competitors who would normally expect to see a steady rise in the cost of moderating their new platforms will now face a step-change in expenses courtesy of

a splintered regulatory environment that now features a Florida state-level requirement. This new requirement would impose an unnecessary cost on existing large platforms, but it would have a much more significant impact on businesses considering founding their own platforms. These potential competitors would not only have to consider how to manage the new costs of achieving scale in a marketplace where size is a key metric of success. They would also have to anticipate the costs of other states' introducing different bills. The result to the consumer will be fewer platforms offering fewer services. *See generally* Thomas W. Hazlett, *The Political Spectrum* (2017) (explaining how previous media regulations such as the FCC's "Fairness Doctrine" have frequently operated to entrench dominant media entities at the expense of smaller competition).

Diverse platform choice and competition is better for consumers and better for groups who wish to reduce any individual platform's influence. To the consumer's benefit, more platforms would allow users to express disapproval with one platform's editorial choice by spending time elsewhere. It would also strengthen consumer feedback by forcing platforms to respond more rapidly or risk losing their user base and their revenue. Groups who believe that platforms have too much power benefit both by increasing the likelihood that they can find a platform that meets their expectations and by witnessing a diaspora of similarly minded users from disfavored platforms.

Florida seeks to impose penalties of up to $250,000 per day for violations of its social media regulations. It has also purported to create both a public and private right of action for private accounts that have been "unfairly" or inconsistently removed, under penalty of up to $100,000 for each successful claim. It's hard to imagine the next garage or dorm-room internet sensation emerging under such conditions.

Further, consumers are best served by a competitive marketplace of both moderated and unmoderated platforms with distinct, differentiable offerings. Government-mandated "neutrality" requirements hamstring platforms' ability to respond to consumer preferences by removing a critical dimension by which platforms can differentiate themselves: terms of service and community guidelines. Content moderation at scale will always end up frustrating large segments of the population, but a platform's editorial discretion to moderate allows online platforms to create communities dedicated to certain subject matters or viewpoints and to remove hateful or harassing speech that may hinder the ability of users to engage with the platform.

If states like Florida truly want to encourage a robust online speech marketplace, their goal should not be to bind platforms to a given political actor's conception of neutrality. Instead, they should promote competition and reduce regulatory compliance costs to ensure that citizens remain free to choose alternatives

that might emerge from the same conditions of growth that current social media success stories have benefitted from themselves.

CONCLUSION

The rights to free speech and press are fundamental and arguably our most cherished civil liberties. They have been essential components of our republic's centuries-long successes. Whatever issues we may have with dominant social media platforms today, robust application of the First Amendment's protections for speech and editorial control is not the problem.

Respectfully submitted,

DATED: November 15, 2021.

/s/ Ilya Shapiro

Ilya Shapiro
Counsel of Record
Thomas A. Berry
CATO INSTITUTE
1000 Mass. Ave., N.W.
Washington, DC 20001
(202) 842-0200
ishapiro@cato.org

CERTIFICATE OF COMPLIANCE

1. This brief complies with the type-volume limitation of Fed. R. App. P. 29(a)(5) because it contains 3,185 words, excluding the parts exempted by Fed. R. App. P. 32(f).

2. This brief complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and the type-style requirements of Fed. R. App. P. 32(a)(6) because it has been prepared in a proportionally spaced typeface in Times New Roman, 14-point font.

/s/ *Ilya Shapiro*
November 15, 2021

CERTIFICATE OF SERVICE

I hereby certify that I electronically filed the foregoing with the Clerk of Court, who will enter it into the CM/ECF system, which will send a notification of such filing to the appropriate counsel.

/s/ *Ilya Shapiro*
November 15, 2021